(2)

No. 86-676

The Supreme Court of the United States

OCTOBER TERM, 1986

EMILY FULLER GIBSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Washington, D.C. 20530
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TABLE OF AUTHORITIES

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1. Petit
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v.

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WRIT OF CERTIORARI TO THE
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E NINTH CIRCUIT

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that they established fraudu-
anting the tolling of the statute
Federal Tort Claims Act, 28
et seq., and that they should
er for damage caused by overt
of a conspiracy that occurred
limitations period, so long as
leged acts occurred within the

their initial complaint on July
ensatory and punitive damages
s, two named FBI agents, vari-

ts, the City of
and unnamed
artment (Pet.
this complaint
ach time with
etitioners then
hich alleged a
ndents to vio-
R. 1-24). "De-
of allegations,
from the late
it federal and
and discourage
ical activities
error and har-
s sought relief
Federal Torts
and from the
2 U.S.C. 1983,
amendments to
Six Unknown
(C.A. App. 4,
ed the Second
Pet. App. 27a).

Will Heaton and
used petitioners'
by burning their
; C.A. E.R. 8-9).
ederal defendants
Gibson's political
tactics, such as
ry information to
contraband drug
e of the complaint

2. The court of appea
the claims against the U
agents (Pet. App. 16a-2
the unnamed federal ag
and 1985(3) (Pet. App.
the dismissal of the *Bi*
named agents "to the ex
activity after July 1, 19

In affirming dismissal
spiracy, the court rejecte
ing on state law, that a
remain timely pleaded if
within the limitations p
The court accordingly h
tions against the indivi
involved actions taken
within the four-year sta
Ninth Circuit has found
(Pet. App. 13a-15a).[4]

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[2] The court of appeals als
1983 claim against the city

[3] The court entered the sa
actions against unnamed c
district court again dismiss
in an order filed on Octobe
with the prompt service req
noting that petitioners' six-
plaint "is unexcused herein"
do not challenge this order, f
in this Court.

[4] The court of appeals not
about the applicability to *B*
sion in *Wilson* v. *Garcia*, 471
Section 1983 claims should
for personal injury actions
event, concluding that it w
shorter statute of limitation

the dismissal of
s and the named
.6), and against
42 U.S.C. 1983
6a).[2] It reversed
against the un-
laim] is based on
App. 21a).[3]
ms based on con-
s' argument, rest-
s of a conspiracy
ct was committed
. App. 10a-11a).
only those allega-
l defendants that
named defendants
nitations that the
to *Bivens* actions

missal of the section
).

to the Section 1983
ts. On remand, the
se remaining claims,
or failure to comply
Fed. R. Civ. P. 4(j),
to so serve the com-
para. 8). Petitioners
before their petition,

e is some uncertainty
of this Court's deci-
985), which held that
tatute of limitations
priate state. In any
propriate "to apply a
y to bar claims * * *

meritless: since petitioners also allege
discovered an incendiary device at the tim
they would not reasonably have relied on
false report. The court also noted that
failed to allege that they undertook dili
within the limitations period to identify t
sible for the fire. Pet. App. 19a-20a.

3. The fact-bound rulings of the cour
on the two issues raised in the petition [6]
this Court's attention.

a. Contrary to petitioners' assertions,
appeals' resolution of the FTCA tolling is
only the application of settled legal prin
facts of this case. In the court of appea
ers presented two theories to excuse the
file an administrative claim until 1979 i
with the alleged burning of their garage
1974.[7] They asserted, first, that their cl

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[6] Petitioners do not here challenge the disn
Section 1985(3) claim. See Pet. 4. Moreover
appear to challenge the court of appeals' affi
dismissal of the Section 1983 claim against the f
ants on the ground that those defendants did
color of state law because, "[b]arring [petit
and conclusory conspiracy allegations, the com
allege a single collusive act within the limitatio
tween the federal and the local defendants (P

[7] Only the 1974 garage fire was described
administrative claim and the Second Amend
The administrative claim (Exh. 2 to the federa
Motion to Dismiss, dated August 29, 1980) als
tioned the 1978 discovery of a "metallic disk" t
suggested might be related to electronic sur
Declaration of Emily Gibson in Support of
Claim paras. 24-27); the government argued i
appeals that this matter was not adequately

fendant's possible involvement.[8] The plaintiff sho be excused from timely filing his claim only if defendant affirmatively concealed his identity.[9] P tioners may believe that on the facts of this case t adequately alleged such concealment, but the court appeals found otherwise.[10] This fact-bound quest does not merit this Court's review.

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[8] The decision of the court of appeals is not in conflict v this Court's decision in *United States* v. *Kubrick*, 444 U.S. (1979). While, as petitioners note, this Court did say in opinion that "[t]he prospect is not so bleak" for someone the plaintiff in that case who knows "who has inflicted injury" (444 U.S. at 122) that remark in no way suggests the time for filing a claim is always—or even usually—tolle the plaintiff does *not* know who inflicted the injury.

[9] Petitioners suggest that "[t]he fact that such fraudu conduct in the present case may not have succeeded in vincing [petitioners] to even initially cast blame for the a upon neighborhood youths seems quite beside the point" (20-21). To the contrary, it is quite the central point. S petitioners were not reasonably misled by the alleged sn ing youths story, then the only alleged act of fraudulent cealment had no effect on them. A failed attempt at fra lent concealment does not give a plaintiff a blank chec sit on his rights until he happens to discover the identit the potential defendant. Contrary to petitioners' sugges (Pet. 21), none of the cases suggest such an illogical inequitable rule.

[10] Petitioners suggest in passing that the court of app was in error in failing to allow them to amend their compl a third time to better allege the elements of fraudulent cealment (Pet. 12 n.1). The district court warned petitio when it permitted them to file a Second Amended Compl that "this would be [petitioners'] last opportunity to an their complaint in order to avoid a final dismissal with pr dice" (Pet. App. 26a). The district court is entitled to d the line at three attempts to fashion an adequate compl and need not allow a fourth, particularly after giving peti ers fair warning.

b. Petitioners also argue that they should be allowed to recover damages from the individual respondents in their personal capacities for actions in furtherance of the alleged conspiracy taken beyond the statute of limitations period. Petitioners suggest that the state rule should be applied, under which all overt acts in furtherance of a conspiracy are timely pleaded whenever the most recent overt act of the conspiracy occurred within the limitations period. See *Wyatt* v. *Union Mortgage Co.*, 24 Cal.3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979). Instead, the court of appeals followed the rule of a majority of federal courts of appeals that have addressed the issue, under which only those overt acts committed within the limitations period are deemed timely pleaded (see Pet. App. 11a). *Lawrence* v. *Acree*, 665 F.2d 1319, 1324 (D.C. Cir. 1981); *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234 (1st Cir. 1977); *Rutkin* v. *Reinfeld*, 229 F.2d 248, 252 (2d Cir.), cert. denied, 352 U.S. 844 (1956); *Wells* v. *Rockefeller*, 728 F.2d 209, 217 (3d Cir. 1984) and cases there cited; *Crummer Co.* v. *du Pont*, 223 F.2d 238, 247-248 (5th Cir.), cert. denied, 350 U.S. 848 (1955); *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), cert. denied, 444 U.S. 900 (1979). But see *White* v. *Bloom*, 621 F.2d 276, 281 (8th Cir.), cert. denied, 449 U.S. 995 (1980); *Slavin* v. *Curry*, 574 F.2d 1256, 1261 (5th Cir. 1978).

Petitioners further assert that this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), requires that the state rule be applied (Pet. 26). But *Tomanio* recognizes that the state tolling rule should not be followed if it is " 'inconsistent with the federal policy underlying the cause of action under consideration.' " 446 U.S. at 485, quoting *John-*

son v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).[11] Here, if conspiracy allegations can be used to relate a complaint back years or even decades, the protection of federal officers against frivolous or harassing *Bivens* actions would be severely weakened, in conflict with this Court's off-stated policy of effective immunity protection for federal officers. The circuit conflict on this issue should not be reviewed in the context of this case, since the only overt acts that petitioners allege were committed within the limitations period are the vaguely described actions of persons who were never named and as to whom all charges have since been dismissed for lack of service.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

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[11] This standard is based on 42 U.S.C. 1988, which makes actions under 42 U.S.C. 1983 expressly subject to state law unless "inconsistent with the Constitution and laws of the United States * * *." Since petitioners seek damages from the individual federal respondents under a *Bivens* theory rather than a Section 1983 theory, this statutory mandate does not apply, and the relevance of *Tomanio* is questionable.

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